

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ALBERT RIVERA,	:	
	:	
Petitioner,	:	
	:	PRISONER
V.	:	Case No. 3:03-CV-743(RNC)
	:	
STATE PRISON WARDEN,	:	
	:	
Respondent.	:	

RULING AND ORDER

Petitioner Albert Rivera, a Connecticut inmate, brings this action pro se and in forma pauperis for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, challenging his state conviction of robbery in the first degree. Rivera took a direct appeal to the Connecticut Appellate Court, claiming that the trial court improperly excluded exculpatory evidence, the state's failure to preserve a photographic array violated his right to due process, and the trial court's failure to instruct the jury regarding the failure to preserve the photographic array violated his right to present a defense. See State v. Rivera, 70 Conn. App. 203, 797 A.2d 586 (2002). After the Appellate Court affirmed, Rivera filed a petition for certification to appeal, asserting only the claim of instructional error. The petition was denied. See State v. Williams, 261 Conn. 910, 806 A.2d 50 (2002). He also filed a habeas petition in state court claiming ineffective assistance of counsel, which remains pending. Rivera now raises in the present petition the

same three claims he raised on his direct appeal but not the ineffective assistance of counsel claim. Respondent has moved to dismiss because Rivera has not exhausted his state court remedies with regard to two of the three claims presented in this petition. [Doc. # 10] For the reasons explained below, the motion is granted.

A prerequisite to federal habeas relief is exhaustion of all available state remedies. 28 U.S.C. § 2254(b); O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999). Even though the Connecticut Supreme Court was not required to grant Rivera's petition for certification to appeal, he had a right to petition for review of all the claims he now asserts in this petition and was required to do so in order to fully exhaust his state remedies. See O'Sullivan, 526 U.S. at 845; see also 28 U.S.C. § 2254(c). The time to petition for certification to appeal is now expired. See Conn. R. App. Proc. § 84-4.

Dismissal of this petition will not place Rivera in danger of violating the one-year limitations period applicable to federal habeas petitions challenging state convictions. When the pending state habeas action is concluded, he will have one full year to file a federal habeas petition. In addition, dismissal of the present petition will enable him to obtain federal court review of his ineffective assistance of counsel claim, now pending in state court, without having to obtain permission from the Second Circuit to file a

second or successive petition, as he would have to do if the present petition were denied on the merits. See 28 U.S.C. § 2244(b)(3)(A).

Accordingly, the motion to dismiss is hereby granted and the action is dismissed without prejudice.

So ordered this 13th day of March 2004.

Robert N. Chatigny
United States District Judge